No. 16,283

IN THE

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

This action was commenced in the U. S. District Court for the Territory of Alaska on June 21, 1956.

Judgement for the plaintiff-appellee was entered by that court on June 12, 1958. Notice of Appeal was filed on July 17, 1958.

Jurisdiction of this appeal in this court is conferred by 48 U.S.C. 1291, 1292 and 1294.

STATEMENT OF THE CASE.

The plaintiff-appellee, Cordova Airlines, Inc. was a small intra-Alaska air carrier, with about 10 airplanes. It was certificated by the Civil Aeronautics Board for routes between Anchorage and Valdez, Cordova, Seward and 14 other stops in Prince William Sound and in the Copper River Valley (Tr-159). The President of the Airline was Merle K. Smith, a pilot of many years experience, who, in 20 years as President-pilot had built the airline from a name and two airplanes to the status of a highly respected carrier (Tr-159).

President Smith had procured insurance to cover his small mortgaged fleet from Coffey-Simpson, Inc., an Anchorage broker, which represented Farwest General Agency of Seattle. Farwest in turn placed the insurance with the Underwriters at Lloyds of London and Eagle Star Insurance Company, Ltd., Orion Insurance Company, Ltd. and Victoria Insurance Company, Ltd., the latter three being Canadian Underwriters (Tr-162).

The back page of the policy which issued is reproduced at page 142 of the transcript and was admitted as Ex-A at the trial (Tr-153).

Construction of the applicability of certain "General Exclusions" and "General Conditions" contained on this back page is the very essence of this appeal. Appellee contended at the trial, and still contends, that the Underwriters are asking the courts to treat the "General Conditions" in the policy exactly as though they were "General Exclusions" and, as to

one defense, to ignore a governing provision of General Exclusion No. 1 and treat it exactly the same as General Exclusions 2 through 6.

The back page of the policy first sets out "Section 1 — Loss or Damage to Aircraft", and contains the general insuring clause applicable in this case which reads (Tr-142, Ex-A):

> "A. The Insurers will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, . . . , from whatever cause arising except frost; wear and tear; corrosion; gradual deterioration; mechanical breakage or breakdown . . ."

Section 2, dealing with third party liability follows and has no application in this case.

The Definitions follow Section 2 and define "Civil Aeronautics Authority", "Flight Risk," "Ground Risk" and "Passenger" and have no applicability, nor lend any assistance in the construction problem involved in this case.

The "General Exclusions" follow. There are six. All of them are governed by an unnumbered, undesignated phrase reading:

"This Certificate and/or Policy does not cover:"

General Exclusion No. 1 is further modified by a phrase governing sub-sections (a) (b) and (c) which reads:

"1. Any loss, damage or liability arising from:"

The "General Conditions" are last. These 10 provisions cover various matters such as requiring that the

plane have an airworthiness certificate, be operated in accordance with its CAA operations manual, that the assured use due diligence, give immediate notice of claims, etc. (Tr-142).

Shortly prior to December 18, 1955 Cordova Airlines had entered into an airplane charter contract with Morrison-Knudsen Company, Inc. for a 90 day period. For the duration of the contract Cordova was to furnish a Cessna 180 airplane and pilot to the construction site superintendent of Morrison-Knudsen Co. The pilot and plane were to be entirely at the disposal of Morrison-Knudsen Co. and to do whatever flying the superintendent directed in connection with the construction by them of roads and buildings at Big Mountain, near Lake Iliamna, Alaska. Morrison-Knudsen was a subcontractor for this purpose to Western Electric Co. which had a contract with the U. S. Air Force to construct a Distant Early Warning radar station on the top of remote Big Mountain (Tr-279). Big Mountain was located on the south shore of Lake Iliamna which was down Cook Inlet and southwest of Anchorage (Tr-234).

A provision in the contract between Western Electric and the U. S. Air Force provided that all supplies and materials acquired by the contractor or sub-contractors became the property of the U. S. Air Force immediately upon acquisition. (Tr-155).

The plane furnished by Cordova was Cessna 180 N-1569C and the pilot was Herbert N. Haley. It is agreed that the plane was covered by the insurance policy here involved for $16,000, less $800.00 deduc-

tible, subject to the defenses raised by the Underwriters (Tr-153). The pilot was a veteran Alaska bush pilot, had been with Cordova since 1942 and had over 12,000 hours of logged time in the air (Tr-161).

On December 18, 1955 the pilot, acting pursuant to orders from Morrison-Knudsen's superintendent, took off from the Big Mountain air strip which belonged to the U. S. Air Force (Tr-298) and flew to Iliamna Bay, located on the shore of Cook Inlet, and there loaded a number of cartons of dynamite into the airplane and took off for Big Mountain (Tr-234). The dynamite had been previously delivered to Iliamna Bay by Morrison-Knudsen but belonged to the U. S. Air Force (Tr-155).

While making an approach to land on the Big Mountain air strip the plane, for some unknown reason, crashed into the side of the mountain. It came to rest about 300 feet from the point of initial impact. The pilot was killed. There were no passengers.

The dynamite did not explode but was scattered from a point 50 ft. beyond the point of initial impact to a point 75 ft. beyond the resting place of the airplane and from 75 ft. to 100 ft. on each side of the path of the plane (Tr-292-295).

Neither the President nor Chief Pilot of Cordova knew the pilot was hauling dynamite at the time (Tr-92, 289, 293). But according to President Smith of Cordova, it wouldn't have made any difference anyway as far as CAB Regulations were concerned because CAB Order S-712 contained a blanket exemption to carry dynamite under the circumstances for

the U. S. Air Force. Smith had been advised by his Washington Counsel when the CAB Order came out and had been advised by Mr. Tibbs, a CAA inspector in Anchorage, that the order contained blanket authority to haul dynamite for the Air Force (Tr-319-320).

The airplane was a total loss (Tr-153).

The Underwriters denied liability on the grounds that the policy did not apply because the airplane was carrying dynamite and was overloaded. There was no claim that the dynamite had anything to do with the crash or that it increased the amount of the loss. The policy nowhere mentions dynamite or explosives or anything similar. The defense was based on the claim that under CAB regulations a waiver was required to carry dynamite that no specific waiver was obtained, or the consent of Insurer and this was a violation of General Exclusion 1(c). Nor was it claimed the alleged overload caused the crash. Underwriters claimed that overloading was a violation of General Condition No. 2 and the mere fact that it occurred, if it did, was enough to relieve them of liability. Underwriters also claimed that since the flight was being conducted without a CAA waiver, the violation of a CAB Regulation made the whole purpose of the flight unlawful, which was a violation of General Exclusion No. 4 and relieved them of liabiilty.

Graham Mower, Chief Pilot for Cordova Airlines, Inc., flew to the scene of the crash the morning after its occurrence. He was qualified as an all 'round experienced Alaskan bush pilot familiar with the area

of the crash, with over 300 hours logged time in Cessna 180 airplanes. The court nevertheless would not permit him to explain his theory of the cause of the crash arrived at after personal investigation, over Underwriters' objection (Tr-299-300).

Conflicting testimony was received on the overloading defense, CAB Order S-712 was received in evidence as well as CAR SR-417 which followed it in time and the jury was instructed on all aspects of Underwriters' defenses. The verdict was for the plaintiff Cordova in the amount of $15,200.00.

The case was tried by the Hon. Harry C. Westover, visiting U. S. District Judge from Los Angeles. Judge J. L. McCarrey, Jr. had disqualified himself on motion of counsel for Underwriters because of having once represented Cordova.

SUMMARY OF ARGUMENT.

I.

While there was a slight inconsistency in the court's instructions on the defense of overloading, the Underwriters were not prejudiced. It was Cordova that was prejudiced by the repeated instructions of the court to the effect that the Underwriters need not show any causal connection between an overload and the crash in order to find against Cordova on this defense. Cordova contends that the only correct portion of the court's instructions on this defense was the part objected to by the Underwriters, which indicated there should be some causal connection shown.

Cordova's stand is based on the ground that General Condition No. 2 of the policy, relied on for this defense, should not be construed as an *exclusion.* There are General Exclusions in the policy, but this defense is not based on one of them, it is based on a General Condition.

Appellant combines its argument on this defense with its argument on the defense that a waiver had not been obtained from CAA to carry dynamite (Specifications 1 and 2). This is wrong and confusing. The overloading defense is based on a General Condition (No. 2) and the waiver defense is based on General Exclusion 1(c). The construction of exclusions does not govern the construction of conditions. The authorities cited by Underwriters apply only to the construction of *exclusions* in policies worded entirely different from the policy here involved.

II.

Appellant's argument that dynamite was carried in violation of General Exclusion 1(c) of the policy, because no waiver was obtained from CAA, ignores the governing phrase of the exclusion, "Any loss, damage or liability arising from:". Appellant even fails to include this phrase when purporting to quote the entire exclusion in its brief.

The words "Any loss . . . arising from:" have a definite intended meaning. They are not to be ignored in construing the policy.

The trial court's instructions to the effect that the loss must have been found to "arise from" the alleged breach were correct.

It is submitted that no person can confidently say that a reading of the CAB Regulations and ICC Regulations on the transportation of explosives makes it clear that a waiver was required to carry dynamite under the facts of this case.

Even if a waiver was required, CAB Order S-712 provided blanket exemption.

III.

The airplane was not being used for an "unlawful purpose", in violation of General Exclusion No. 4, even if it is assumed to have been violating a CAB regulation at the time.

The "purpose" of the flight was to supply dynamite for the construction of a Distant Early Warning radar station and was entirely lawful. Even if a CAB regulation had been violated, this would be only incidental to a perfectly lawful, legitimate purpose.

The court's instructions were more helpful to Underwriters under the facts of this case than they had a right to expect.

IV.

There were ambiguities in the policy. Cordova and Underwriters differed on the construction of General Exclusion 1(c), the meaning of the phrase "unlawful purpose" and the difference between General Exclusions and General Conditions. If these provisions could convey different meanings to the parties, they could easily have seemed ambiguous to the jury after a long trial.

This court itself found an almost identical policy highly ambiguous in the *Eagle Star* cases, 196 F. 2d 317 rehearing granted 201 F. 2d 764.

The court's instructions on ambiguity were correct.

ARGUMENT.

Each of appellant's points of argument will be considered in the order presented in its brief.

I. APPELLANT ENTITLES PART I OF ITS ARGUMENT ON PAGE 15 OF ITS BRIEF AS FOLLOWS:

"Underwriters Need Not Show That Breaches of the Conditions and Exclusions of the Policy Resulted in the Crash."

Appellant's sixth affirmative defense alleged, among other things, that the aircraft was overloaded at the time of its destruction, that this was a violation of a general condition of the policy of insurance and done without the knowledge or consent of underwriters (Tr-31).

Considerable and conflicting evidence was introduced by both sides as to the overloading aspect and the jury found for the appellee.

In Specification of Error No. 1 (p-7 Brief) appellant quotes what it considers an objectionable portion of the court's instructions on overloading. Appellant contends that this particular portion, of all the court's instructions on the defense of overloading or exceeding the operations limitations of the plane, is erroneous law, because it was not required to show

any causal connection between the overloading, if it happened, and the crash in order to avoid liability. The mere fact of overloading alone is enough to relieve them of liability, they contend.

Appellee concedes this might be a reasonable contention *if* the Underwriters had listed operating outside operations limitations as an *exclusion* in the policy, but they did not do this.

The defense is based on what the policy labels General Condition (2) (Tr-142) which is set out in fine print on the back page of the policy in the following form:

"General Conditions

1. . . .

2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA Approved Operations Manual, and in accordance with operations authorized as set forth therein."

There are 10 such General Conditions. No mention is made in the policy of the effect of a breach of the General Conditions.

Section 1, entitled, "Loss or Damage to Aircraft", at the top of the same page contains the general insuring clause. Sec. "A" provides that insurers will make good a loss of the aircraft ". . . from whatever cause arising *except* frost; wear and tear . . ." etc. (Emphasis added).

Farther down on the same page (Tr-142) appear the "General Exclusions" which provide that "This Certificate and/or Policy does not cover:", thereafter listing the exclusions.

The fine print therefore contains a general insuring clause under Section 1, making certain *exceptions* for which Underwriters will not pay or make good the loss, and certain General Exclusions, which the policy *does not cover* and, finally, certain General Conditions, with no explanation or definition as to the effect of a breach of No. (2) on which underwriters rely for this defense.

Certainly if the underwriters had intended that operating the airplane in violation of its Operations Limitations was to be an *exception* to the loss coverage, or, that the policy exclude or *not cover* such a flight, they would have so stated under Section 1 or under the General Exclusions. Instead it has been covered as an admonition or general condition.

The only question is, what are the *conditions* attached to a violation? If a violation was meant to *void* the policy, they would have so stated as they actually did do in General Condition No. 9. If a violation of General Condition No. 2 was to have the effect of relieving underwriters from liability, they could have so stated as they did do under General Condition No. 7.

If the General Conditions are, as appears to be the case, merely a collection of "catch-all" provisions, how should a trial court instruct a jury when a violation is relied on as a defense?

The court's instructions on this defense are quoted below in their entirety commencing at Tr-357.

> "You are instructed that the defendants have asserted three defenses, which are based upon

provisions of the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now, I want to stop there and emphasize 'preponderance of the evidence'. Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases the rule is that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of evidence. *Your verdict must be in favor of the defendants and against the plaintiff if you find by a preponderance of the evidence, having in mind all the instructions given you by the court, that the defendants have established all or any one of these three defenses. You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur.* (emphasis furnished)

"The defendants contend, among other defenses, that the policy of insurance here involved relieves them from liability for payment for the loss of the airplane because it was loaded in excess of the weight permitted in the Operations Limitations as establsihed by the Civil Aeronautics Authority and was therefore in violation of paragraph 2 of the General Conditions contained in the policy of insurance which reads as follows:

'2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA approved Operations Manual and in accordance with operations authorized as set forth therein.'

"The defendants have asserted this defense as an affirmative defense and are therefore required to prove all of the elements of the defense by a preponderance of the evidence.

"In considering the defense that the airplane was loaded in excess of the permissible load limit at the time it crashed you must consider all of the evidence presented by both plaintiff and defendants to determine whether the defendants have proved by a preponderance of the evidence that the airplane actually was loaded in excess of its permissible load limit. *If you find that the defendants have not proven by a preponderance of the evidence that the airplane was loaded in excess of its permissible load limits you must find for the plaintiff and against the defendants on this defense.* (emphasis furnished)

"If you find that the defendants have not proved by the preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the plaintiff on this defense." (Tr-357-358).

Later, commencing on page 364 of the transcript the court further instructed the jury on the overloading aspect as follows:

"One of the defenses which the defendants assert is their allegation that the aircraft was not being operated in accordance with its Operations Limitations and/or CAA approved Operations Manual

and in accordance with operations authorized as set forth therein. Defendants claim that at the time it crashed the aircraft was overloaded, in violation of said regulation. In considering this defense, you must determine the maximum weight of aircraft and contents allowable under regulations for this particular aircraft. You must next determine whether or not the aircraft was laden in excess of its legal limits. *If you find that at the time it crashed the aircraft was overloaded, in violation of its operations limitations or CAA approved Operations Manual, then your verdict must be for the defendants and against the plaintiff on this issue.*" (emphasis furnished)

The contention of plaintiff Cordova Airlines, Inc. had been that in order to defeat a recovery on the defense of overloading the Underwriters would have to prove that the plane was overloaded and that the overload was the cause of the accident.

The policy itself was no help in trying to determine the intent of the Underwriters when General Condition No. 2 was inserted. All that could definitely be determined was that the provision was not intended to be an *exception* under Section 1 or a General Exclusion because it was not listed under these categories.

Actually, the court instructed the jury *three times* to the effect that the Underwriters did not have to prove that the overloading, assuming there was overloading, caused or contributed to the crash in order to find for the defendant. (See italicized portions of above quoted instructions).

The very last words to the jury on the subject of overloading were that if they found that the airplane was overloaded, their verdict should be for the defendants.

The court did not send the instructions to the jury room with the jurors (Tr-368-369).

Appellant contends that the last portion of the above quoted instruction on overloading, ending on Tr. 357-358 entitles it to a new trial. It is admitted that the paragraph objected to is not entirely reconcilable with the instructions as a whole. This was pointed out to the court by counsel for Cordova (Tr-336). This, even though it did rightly express plaintiff's view of the law governing the point. It was obvious from the instructions as a whole that the court had not adopted plaintiff's view of the law and any slight inconsistency could be used for the very purpose it is being used—that of claiming a new trial with the resulting delay and hardship on the insured.

The court felt however that the words "by the preponderance of the evidence" eliminated any inconsistency (Tr-336).

In any event, the instructions, as a whole were *overwhelmingly* to the effect that Underwriters need not show that overloading caused or contributed to the crash in order to defeat recovery. If they found the plane was overloaded, plaintiff lost the case.

It is obvious, however, that the portion of the instructions objected to could only prejudice Underwriters *if* the jury first found that the plane was

overloaded and then went on to decide whether or not the overload had caused the accident. This is not likely to have happened at all. The instructions were almost entirely devoted to the theme that if an overload was proven, plaintiff could not recover. The conclusion is almost unavoidable—the jury found there was not an overload and its deliberations ended there.

As stated before, it was and still is, Cordova's contention that since the condition relied on was not included within the exceptions to the insuring clause or among the General Exclusions, recovery could not be defeated unless it was proven that there was an overload and that the overload was the cause of the loss.

Underwriters rely on *Bruce v. Lumbermen's Mutual Casualty Co.,* 222 F. 2d 642 to support its contention that no causal connection need be shown between the breach of an exclusion clause and the accident.

In the first place, we are not here concerned with an alleged breach of an *exclusion clause* as to the overloading aspect. The defense was based on an alleged breach of a *general condition,* which was not otherwise defined by the policy. There were exclusion clauses in the policy in issue, but the alleged breach was not included amongst them.

The *Bruce* case covered an entirely different phase of aviation law. The suit was based on public liability provisions where liability under a given policy could run from $1.00 to the upper limit, usually high. The policy in the case at bar was simple hull coverage for $15,200 to protect Cordova's mortgagee.

In the *Bruce* case the court described the policy as follows:

> "An exclusion in the policy 'provided in effect that the policy should *not apply*' (d) to liability with respect to bodily injury or damage caused by the operation of the aircraft with the knowledge of the named insured; (1) if used for any unlawful purpose, or during flight or attempt thereat, in violation of any government regulation for civil aviation" (emphasis added).

It is plain enough that the alleged breach was under an *exclusion* clause wherein it was stated that the policy would *not apply.* The holding is not at all controlling or applicable here.

In *Travelers Protective Association of America v. Prinsen,* 291 U.S. 576, 78 L.Ed. 999, cited in the *Bruce* case, the insurance policy specifically *excluded* liability for death of a person which occurred in the transportation of explosives. Again, public liability; again, a specific *exclusion clause* for death occurring while explosives were being hauled.

Underwriters cite *Des Marais v. Thomas,* N.Y., 1955, 147 N.Y.S. 2d 223. Here, *General Exclusion* 1(b) was in question in a public liability suit for death. The discussion is by the "Supreme Court Special Term, N.Y. County, Part III". No judgment was rendered. The discussion by the court did not apply to the facts involved here. Apparently the only thing accomplished was to grant a partial summary judgment on a point of law unrelated to this case and grant plaintiff additional time to plead in answer to

interrogatories. The case is not authority for anything.

Also cited by appellant is *Globe Indemnity Company v. Hansen,* 231 F. 2d 895. The insurance policy provided that it "does not apply . . . to any insured:

> (b) Who violates or permits the violation of any governmental regulations for civil aviation applying to aerobatics, instrument flying. . . ." (emphasis added).

The court said "The *exclusion is based on contract,* which excludes the risk without regard to causal connection" (emphasis supplied). Citing the *Bruce* and *Travelers* cases as authority. Again public liability and a definite exclusion clause.

The last case cited by Underwriters was *Lineas Aereas Columbianas Expresas v. Traveler's Fire Insurance Co.,* 257 F. 2d 150. The policy expressly provided that it would not apply unless certain standards were maintained. The crash and loss of 37 lives occurred, the court found, while the plane was in violation of about every standard imaginable, and with the knowledge and consent of the insured, except as to one. A specific *exclusion clause* was relied on.

It is obvious the foregoing authorities are based on exclusion clauses which provide that the policy shall not apply to the particular situation or risk.

The Underwriters could have so provided. The policy here under study had exclusion clauses which provided that the policy did not apply to the situations

named. Exceeding the operations limitations was not so listed. It was merely listed as a condition.

Since the foregoing authorities hold that violation of the particular specific exclusion clauses alone, without a showing of causal connection, is enough to suspend the policy, they must be accepted on that basis. Such a rule is based on the strict letter of the contract, as was pointed out in the *Globe Indemnity* case. It can result in what might seem to be harsh law in some instances. The whole purpose of the contract of insurance was to protect the insured *if* he sustained a loss. After the loss, insurer is relieved by a fortuitous circumstance even though the violation had nothing whatever to do with causing the loss.

But just as the cases cited by Underwriters are authority for construing the exclusion strictly as written, they are likewise authority for not construing a provision as an exclusion *when it is not stated as such.* Underwriters, it appears, would like to eat their cake and have it too—or insist on the pound of flesh from whatever region they designate. They are asking the courts to apply the strict and sometimes harsh rule of law on exclusions to what is admittedly separately stated in the contract to be a condition. As far as Underwriters are concerned, every provision in the policy is an exclusion—after the loss. This is not fair to the average insured. Even one skilled in interpreting policies of insurance and familiar with the law on exclusions couldn't know that the actual courtroom attitude of Underwriters would be that all breaches are exclusions.

And, just as the foregoing cases are authority that no causal connection need be shown on violation of an exclusion clause, they are likewise authority that causal connection *must* be shown if the alleged violation is not stated to be an exclusion.

The foregoing argument assumes a breach. Actually, in this case the question of whether or not the plane was overloaded was put to the jury on instructions loaded in favor of Underwriters' contention that the condition was an exclusion and the jury found in favor of Cordova.

More is written on this point under Part V of this Argument.

II. PART II OF APPELLANT'S ARGUMENT, COMMENCING ON PAGE 19 OF ITS BRIEF IS ENTITLED:

"Dynamite Was Carried in Violation of Exclusions in the Policy."

The words "dynamite" or "explosives" or anything similar are not mentioned anywhere in the policy involved in this case. However, almost two years after the suit had been filed, and the day before trial, the Underwriters were permitted to file additional affirmative defenses which included this defense (Tr-45).

The defense is based on a subdivision of one of the General Exclusions in the policy and appellant's reasoning is that under the applicable regulations of the CAB explosives or dangerous articles could not be transported, even in cargo planes, without special authority from the CAB in the form of a waiver; that ICC Regulations, which governed the definition of the type explosives meant by CAB, made an Explosive

"A" a "prohibited article". Since no special waiver was obtained or the "express written consent of Farwest General Agency for Insurers" obtained, the flight violated General Exclusion 1(c). It was not contended by Underwriters that the dynamite aboard caused or contributed to the loss of the airplane and it was stipulated that the dynamite did not explode when the crash occurred.

This technical defense is based on a complicated interpretation of CAB and ICC Regulations and then related to the waiver requirement of the policy. To follow appellant's reasoning through, one must first examine Sec. 49.0 of CAB Regulations, 14 C.F.R. Part 49 at Page 276. This section is entitled, "Applicability of Part" and says that explosives or other dangerous articles, listing a number of such materials, *but not dynamite,* shall not be transported by air, "except as provided in this part."

Eighty-one sub-sections later in the part, Sec. 49.81 (14 C.F.R. Page 285) entitled, "Prohibited Articles" states:

> "No explosive or dangerous article listed in the I.C.C. Regulations (49 C.F.R. Part 72) as an Explosive A, a Poison A, a forbidden article, or as an article not acceptable for rail express (see Sec. 49.62 for authorization of the carriage of certain radioactive materials) nor any article listed in Appendix A shall be carried on aircraft subject to the provisions of this part."

Appendix A is printed in full immediately following the above subsection and is entitled,

"Appendix A — Items Prohibited From Transportation By Air"

Explosives

. . . . . ."

Thirty-four items are listed *but not* dynamite nor anything similar. Appendix B, immediately following Appendix A, obviously *does permit "all Class B Explosives"* to be carried on aircraft not carrying passengers.

Appellant, however, reasons directly from Sec. 49.81 to the ICC Regulations to support its theory. 49 C.F.R. Sec. 72.5 is entitled, "List of Explosives and Other Dangerous Articles", and there follows 23-1/2 pages of fine print, listing various articles with abbreviated classifications and other data. "Dynamite" is not listed except to refer the searcher to "High Explosives" of the same list. Only two "High Explosives" are listed. One is apparently liquid. Both are listed as "Expl. A" but dynamite again is not mentioned. The reader is referred to Sections 73.61 to 73.87. Section 73.61 on page 65 is entitled, "High Explosives" and reads in part:

> "(a) High explosives (dynamite), *except gelatin dynamite* when offered for transportation by rail freight or highway must not contain in excess of 60 per cent of *liquid explosive* ingredient and when offered for transportation by carrier by water . . . ." (emphasis furnished).

Appellant's reasoning omits consideration of Sec. 73.61 however and reverts again to the CAB Regulations, 14 C.F.R. Sec. 49.71, page 283 which provides in part:

"(a) Deviations from any of the provisions of this part for a particular flight may be authorized by the Administrator where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of *persons and cargo.*" (emphasis added).

Appellant does not cite Sec. 49.41, 14 C.F.R. page 281 which reads:

"Articles which may be Carried in Cargo Aircraft

"In addition to the articles acceptable for the transportation on aircraft carrying passengers, any article acceptable for and packed, marked, and labeled in accordance with the ICC Regulations (49 C.F.R. Parts 71-78) for transportation by rail express may be carried in cargo aircraft: Provided that no article listed in Appendix A of this part shall be carried except under the provisions of Sec. 49.71 . . ."

Again it is noted that dynamite, or any item similar to dynamite, is not mentioned in Appendix A.

With the above sections in mind, the Underwriters' reasoning in skipping from Sec. 49.0 to 49.81, then to a portion of the ICC Regulations and finally back to Sec. 49.71 is in the open. It has completely ignored the fact that dynamite is not at all covered in Appendix A, that Sec. 49.41 comes the closest to applying to cargo aircraft such as the one lost in the case at bar, that Sec. 49.71 properly applies to carriage of prohibited articles with persons and cargo.

Underwriters expect the court to assume that the dynamite in this case was not gelatin dynamite or that it contained in excess of 60% of liquid explosive

ingredient, and that it actually was a Class A explosive when the evidence before the court cannot sustain such an assumption. The ICC Regulations involved were written for rail express, rail freight, highway and water carriage. They are not intelligible when applied to air carriage and the CAB Regulations.

The complicated basis for this last minute defense was confusing at the time of trial. The tortured nature of the reasoning was not as apparent then as it is at the present time.

In any event, after arriving at the conlusion that a waiver should have been obtained from CAA to make the flight in question, or written permission from the Underwriters, appellants claimed a violation of General Exclusion 1(c) of the policy.

On page 19 of its brief appellant purports to quote this exclusion verbatim. Apparently through oversight it neglected to quote the controlling portion upon which the court based its instructions. In omitting to quote all of the exclusion clause appellant's brief is entirely without meaning on this particular point.

The exclusion relied on is set up in the policy as follows (Tr-142, Ex-A):

"GENERAL EXCLUSIONS"

This Certificate and/or Policy does not cover:

1. *Any loss, damage or liability arising from:*

(a) ...

(b) ...

(c) ... or any flying in which a waiver issued by the Civil Aeronautics Authority is required

unless with the express written consent of Farwest General Agency for Insurers" (emphasis supplied).

It is obvious from examining Exhibit A that appellant omitted to include the governing phrase of Section 1 consisting of the words, "Any loss, damage or liability *arising from:*" (emphasis furnished).

When the omitted section is considered in connection with the waiver requirement the meaning of the court's instruction which is contained in part on page 362 of the transcript explaining to the jury that the actual loss of the airplane must have been found to have "arose from" or be "the result of" the failure of the plaintiff to obtain a written waiver are thoroughly understandable.

It is presumed that the Underwriters meant what they said when they devised the format of their own policy. The obvious plain everyday meaning of the wording would be taken to be that the policy would not cover any loss during any flying in which a waiver was required if the loss was one "arising from" failure to procure the waiver. What other meaning could have been intended by the use of the phrase? "Arising from" means "growing out of", "the result of" in ordinary usage. Appellant completely ignores the governing words of paragraph (1) of the General Exclusions in its argument. It never has contended that failure to procure a waiver, in and of itself, caused the loss, nor that the fact that there was dynamite aboard had anything to do with the crash.

If the Underwriters had intended that the policy not cover any flying done without a waiver, they would have omitted the words "(1) Any loss, damage or liability arising from:" from the policy. Then the overall governing words:

"This Certificate and/or Policy does not cover:" would then have achieved the result they now contend for.

A look at the policy (Tr-142) immediately reveals that the beginning words "This Certificate and/or Policy does not cover:" applies to *all six* exclusions. But as to exclusions (1)(a), (b) and (c) only, the exclusion is *obviously* and *purposely* modified to loss or damage "Arising from" violation of those exclusions. To give the exclusion the interpretation advanced by the Underwriters would render subsection 1(a), for example, totally meaningless. The mere fact that the U. S. might be at war somewhere, or that a riot existed somewhere, would exclude a loss coverage, even though war or riot had nothing whatever to do with the reason for the loss. It is obvious the Underwriters meant to exclude a loss "arising from" war, riots, etc. and "arising from", as used, could only mean a loss "caused by" or the "result of".

Cordova's argument was that even if a waiver could be construed to be required for a flight by a chartered cargo plane from one remote spot in Alaska to another under the circumstances existing, a blanket exemption from such requirement existed in the form of CAB Order S-712. This order was introduced in evidence and is printed as Appendix A to appellant's brief.

The instructions given by the court on this defense were as follows:

> "You are instructed that the defendants have asserted three defenses, which are based upon provisions of the certificate of insurance which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now, I want to stop there and emphasize 'preponderance of the evidence'. Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases, the rule is, that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of the evidence. Your verdict must be in favor of the defendants and against the plaintiff if you find by a preponderance of the evidence, having in mind all of the instructions given you by the court, that the defendants have established all or any one of these three defenses. You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur" (Tr-357).
>
> . . . . . .
>
> "The defendants contend, among other defenses, that the flight in question—that for the flight in question, the plaintiff failed to obtain a waiver as required by Civil Air Regulations Part 49

and also failed to obtain written permission from the Farwest General Agency to make the flight in question.

"The policy of insurance reads as follows insofar as applicable to this defense:

" 'This Certificate and/or Policy does not cover:

'1. Any loss, damage or liability arising from: . . .

. . . . . .

'(c) . . . or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers.'

"In this connection the plaintiff contends that Civil Aeronautics Board Order S-712, which has been introduced in evidence as defendants' Exhibit A amounts to a blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3, the plaintiff was given a blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific waiver from Civil Aeronautics Authority.

"In this connection you are instructed that the Civil Aeronautics Act defines 'United States' as:

'United States means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof.'

"The plaintiff contends that the Territory of Alaska was included in the order, that plaintiff was engaged in a charter carriage of dynamite

belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

"If you believe that defendants' Exhibit A contained blanket authority for the plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

"If you believe that the defendants' Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1(c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane 'arose from and was the result of' the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

"If you find that the loss of the airplane 'arose from' or was 'the result of' plaintiff's failure to obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent, then you must find for the defendants on this issue."

The defense now being discussed was one of the "three defenses" referred to at the beginning of the court's instructions. It is immediately obvious that

Cordova's case as to this defense was prejudiced when the court said:

> "You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur" (Tr-357 and above quotes).

The above quoted portion is directly contrary to the latter part of the instruction which adopted plaintiff's interpretation of the meaning of the phrase "arising from". It is contended that the latter portion adopts a correct view of the law and that plaintiff's case was prejudiced by the earlier statement.

III. PART III OF APPELLANT'S BRIEF, COMMENCING ON PAGE 23 IS ENTITLED:

> **"Civil Aeronautics Board Order S-712 Is Not Applicable to Cordova Airlines."**

Appellant states on page 24 of its brief that:

> "There is no evidence linking Cordova Airlines with Order S-712".

The court's attention is invited to the order itself, printed as Appendix A to appellant's brief and to the testimony of Merle K. Smith, President of Cordova Airlines, Inc., commencing on page 317 of the transcript to the effect that Mr. Tibbs, an Anchorage,

Alaska inspector for Civil Aeronautics Authority, assigned to inspect the operations of Cordova had advised Smith that blanket authority existed for Cordova to carry explosives for the Air Force. And to page 319 of the transcript where the same witness refers to the order of December 2, 1955 as constituting blanket authority to haul dynamite, that the airlines' counsel in Washington D. C. had wired and told Cordova that such an order was coming out. And to page 319 where it was testified that Mr. Tibbs of the CAA was still stationed in Anchorage, although attending a CAA school in Oklahoma at the time of the trial.

Appellant relies greatly on the preamble to Order S-712 in arguing that it was not applicable. It is submitted that the trial judge was correct in stating on page 328 of the transcript:

> "The Court. I'm sorry, but it's the Order that counts and not the preamble that goes before, so I will overrule your objection."

Comparing the actual order, following preamble paragraph 7, with the testimony at the trial it is known that the aircraft in question was on charter to Morrison-Knudsen, a sub-contractor to the U. S. Air Force as prime contractor, that the plane was being used as a cargo plane only, at the time of the crash, that the movement of the dynamite was to an airport owned by the U. S. Air Force, that where the word, "United States" is used in the order it included Alaska under the Civil Aeronautics Act.

There is no claim by the Underwriters that the loading and securing of the dynamite in the aircraft was

not in compliance, nor that the pilot was not briefed on handling explosives. The provision of the order concerning flying out of civil airports obviously was not applicable to a flight from an uninhabited bay on Cook Inlet where the lone pilot landed, did his own loading, took off and was approaching to land on a mountain air field located five miles from a remote construction site.

The order had been interpreted by a CAA official as constituting blanket exemption, Cordova Airlines considered it to give blanket exemption, CAB never charged Cordova with a violation of any of its regulations in connection with this flight (Tr-318).

It is submitted that the trial court could and should have granted a summary judgment as to the defense of Underwriters based on this order. Submitting the question to the jury was all to the Underwriters' advantage.

All this is aside from the fact that, as a cargo plane, operating under the circumstances of this case, probably no *waiver* or *blanket exemption* was required to haul the dynamite.

This court's attention is again invited to the matter mentioned under II of this argument—Sec. 49.41, 14 C.F.R. at page 281, entitled "Articles Which May Be Carried In Cargo Aircraft" provides that *any article* that could be carried by rail express under ICC Regulations, can be carried in cargo aircraft without a waiver, unless it is an item mentioned in Appendix A. And that Appendix A *does not list dynamite.* If, con-

ceivably, an article could not be carried by rail express, yet was not listed in Appendix A so as to require a waiver, then what rule governs? The completely confusing tie-in between CAB Regulations and ICC Regulations results in "dead end" searches in this area.

Appellant argues on page 24 of its brief that Cordova did not claim retroactive benefit from CAB Order SR-417 (21 F.R. 3776) which was also admitted into evidence (Tr-140). This order is printed as Appendix A to this brief.

The court will note that this order deals specifically with the Alaska situation, brought to a head by Underwriters' refusal to pay the claim in this case on the ground that dynamite was being carried. The order recites the factual situation existing, the fact that the "White Alice" projects were behind schedule, and grants specific authority to certain air carriers authorized by Morrison-Knudsen Co., Inc. to carry explosives. Cordova Airlines Inc. is named as being one of such carriers. The requirements of the order are almost *exactly the same* as those of Order S-712 and the order is timed to take effect just two days before Order S-712 expires.

The issue of whether or not Order S-712 applied was put to the jury. The Underwriters should not complain.

IV. PART IV OF APPELLANT'S ARGUMENT ON PAGE 25 OF ITS BRIEF IS ENTITLED:

"The Aircraft Was Being Used for an Unlawful Purpose."

This argument is based on the premise that carrying dynamite on the flights in question without a waiver was in fact a breach of CAB Regulations. That point has been argued under Section II of this argument.

What appellant means is that *if* the carriage of dynamite without a waiver was a violation of the regulations, then the flight was being conducted for an "unlawful purpose" and a violation of a General Exclusion of the policy, *if* it was done with the knowledge and consent of assured.

As a further reinforcement of its argument that the flight was being conducted for an unlawful purpose the Underwriters rely on 49 U.S.C. 622(h) which provides for a criminal penalty upon conviction of violation.

Appellant purports to quote the pertinent part of this section on page 25 of its brief. It is submitted that appellant has again by oversight omitted important and governing portions.

Section 622 is entitled, "Criminal Penalties" and reads in part:

> "(h)(1) Any person who knowingly delivers or causes to be delivered to an air carrier or to the operator of any civil aircraft for transportation in air commerce, or who causes the transportation in air commerce of, any shipment, baggage, or property, the transportation of which would be prohibited by any rule, regulation, or requirement prescribed by the Civil Aeronautics Board, under

> subchapter VI of this chapter, relating to the transportation, packing, marking or description of explosives or other dangerous articles shall, upon conviction thereof for each such offense, be subject to a fine of not more than $1,000, or to imprisonment not exceeding one year . . ."

If the actual wording is compared it is obvious that the word "knowingly" was omitted.

In any case, whether or not the pilot of the aircraft in this case violated a safety regulation was put to the jury who found that he had not.

The above quoted section does not appear applicable to the case or to the exclusion relied on. It is believed to have been cited to the Trial Judge to show that it is a criminal offense to violate a safety regulation, thereby somehow emphasizing the claim that the aircraft was being used for an "unlawful purpose".

The format of the policy containing General Exclusion 4, relied on by appellant for this defense, is as follows (Tr-142, Ex-A):

> "General Exclusions
>
> This Certificate and/or Policy does not cover:
>
> 1. . . .
>
> 2. . . .
>
> 3. . . .
>
> 4. . . .; the use of the Aircraft for any unlawful purpose if with the knowledge and consent of the Assured;"

The Underwriters' contention, in effect, is that if the pilot violated a regulation during the flight in

question, then the whole purpose of the flight itself became unlawful.

It is undisputed that the flight was being made to bring dynamite to use in the construction of a Distant Early Warning radar station on a remote mountain. The result of such a flight would be to further the national defense effort. The reason for making the flight was not claimed to be unlawful by the Underwriters.

If the object of, effect of, reason for, or purpose of the flight was lawful, then it is submitted that it can not be argued with any force at all that the airplane was being used for an unlawful purpose.

Assuming, without admitting, that a CAB regulation was violated during the flight—this would have nothing to do with the *purpose* of the flight. In such case, the violation would be merely *incidental* to the use of the airplane for a perfectly legitimate, lawful ultimate purpose. To hold contra would permit any type flight to become a flight for an "unlawful purpose", if the pilot at any time committed any infraction of CAB regulations. It is submitted that the Underwriters had in mind uses of the plane for smuggling, counterfeiting, etc. where the entire reason for a flight was for the purpose of committing an unlawful act, and where the act was committed "with the *knowledge and consent of the Insured.*"

The exclusion not only requires that the purpose of the flight be unlawful; it must have happened with the knowledge and consent of the Insured.

The undisputed testimony was that the airplane belonged to Cordova Airlines and was under charter to Morrison-Knudsen Co., Inc. for 90 days. Although Cordova furnished and paid the pilot, both pilot and plane were located in the bush country for the period of the charter and completely at the disposal of Morrison-Knudsen Co., Inc.

The President of Cordova Airlines testified that he did not know the plane was being used to carry dynamite on the day in question (Tr-289, 99). The pilot was at the disposal of Morrison-Knudsen Co., Inc. and took flying orders from them.

The court fully instructed the jury on the defense of "unlawful purpose", whether the flight was made with the knowledge and consent of Cordova and even on the "criminal penalty" aspect as requested by Underwriters. The court's instructions are quoted below:

> "You are instructed that the defendants have asserted three defenses, which are based upon provisions of the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now I want to stop there and emphasize 'preponderance of the evidence'. Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases, the rule is that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of the evidence. Your verdict must be in favor of the defendants and against the

plaintiff if you find by a preponderance of the evidence, having in mind all of the instructions given you by the court, that the defendants have established all or any one of these three defenses. You are instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft—that is to say, that defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur." (Tr-357)

. . . . . .

"One of the defenses asserted by the defendants in this case is that, at the time it crashed, Cordova Airlines' aircraft N-1569-C was being used for an unlawful purpose, with the knowledge and consent of Cordova Airlines. In considering this defense, you must first determine whether or not the aircraft was engaged in transporting explosives at the time of its loss. If you find that the aircraft was carrying explosives then you must further determine whether or not any explosives so carried consisted of dynamite. If you determine that the plane was carrying dynamite then you must determine whether a waiver was secured by the United States Civil Aeronautics Authority authorizing the carrying of dynamite on the flight on which the aircraft was destroyed, providing you find that a waiver was necessary. If you find that the aircraft was carrying dynamite and no such waiver had been secured and find also that a waiver was necessary from the Civil Aeronautics Authority then you are instructed that the carrying of dynamite was unlawful. Dynamite is clas-

sified by the applicable government regulations as a Class A explosive, and the transportation of dynamite was, accordingly, prohibited by such regulations, unless a waiver was secured from the Civil Aeronautics Authority, unless such waiver had been waived. By Act of Congress, it is a criminal offense for any person to knowingly deliver or caused to be delivered to an air carrier or to the operator of any civil aircraft, for transportation in air commerce or for any person to cause the transportation in air commerce of, any shipment of property the transportation of which is prohibited by any rule, regulation, or requirement prescribed by the United States Civil Aeronautics Board, relating to the transportation, packing, marking, or description of explosives.

"The knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question is a question of fact for you to determine. Ordinarily, the knowledge and consent of an agent is attributable to and is legally binding upon the principal." (Tr-362-364.)

. . . . . .

"Further reference is made to the defense asserted that Cordova Airline aircraft No. N-1569-C was allegedly being used for an unlawful purpose with the knowledge and consent of the plaintiff airline. You are instructed that the applicable United States Civil Aeronautics Board regulations provide that no air carrier or other operator of aircraft shall knowingly accept explosives for carriage by air unless the shipper or authorized agent has issued a certificate to the air carrier, certifying that the shipment complies with the Civil Aeronautics Board regulations governing

the transportation of such explosives and it is a criminal offense for any person knowingly to violate the provisions of said regulation. Such a certificate, that the shipment of explosives complies with the regulations, is required by law prior to carriage of explosives by air, in addition to any waiver which may or may not have been issued by the Civil Aeronautics Authority for the flight upon which this aircraft was destroyed. If you find, then, that the purpose of this particular flight on December 18, 1955 was to transport a quantity of explosives with respect to which no certificate of compliance had been issued to the air carrier or operator by the shipper, and that such use of the aircraft was with the knowledge and consent of Cordova Airlines, or the pilot (if you find that the pilot was an employee of Cordova Airlines) then your verdict must be for the defendants and against the plaintiff on this issue without regard to the question of whether or not any waiver had been secured from the Civil Aeronautics Authority for the flight upon which the airplane was destroyed (Tr-364-365).

Again considering the instructions to the jury on the unlawful purpose aspect the court said:

"The defendants contend, among other defenses, that paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for the payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of the Civil Air Regulations and the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions insofar as applicable to this defense reads as follows:

> 'This Certificate and/or policy does not cover the use of the aircraft *or* any unlawful purpose if with the knowledge and consent of the assured.'

"This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defenses by a preponderance of the evidence.

"In this connection you are instructed the word 'purpose' is defined as 'the object; effect, or result, aimed at, intended, or attained.'

"You are instructed that the meaning of the word, 'use' is defined as: 'the purpose served—a purpose, object or end for useful or advantageous nature, implying that the person receives a benefit from the employment of the factor involved'.

"You are also instructed that the policy of insurance here involved in paragraph 8 reads as follows:

> 'Purposes for which aircraft will be used: private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction.'

"If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from the Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense." (Tr. 358-360.)

It is submitted that the instructions given were, on the whole, prejudicial to Cordova's case where they

touched on the "Criminal Penalty" statute. Even if a regulation had been violated, that fact had no bearing on whether the purpose of the flight was unlawful. The same reasoning applies to the court's instruction on the certificate of compliance aspect (Tr-364-365). Even if no certificate of compliance was used, this had nothing to do with ultimate purpose.

Where the instructions touched on "unlawful purpose" and "knowledge and consent", it is submitted that they were absolutely correct.

As to the Certificate of Compliance aspect of this defense see the testimony of Mr. Bud S. Seltenreich, Chief Air Carrier Safety Maintenance Branch, CAA, Anchorage, called by Cordova. On page 312 as to Civil Air Regulation Section 49.3(b), concerning air carrier's certificates, he "wasn't certain" on the witness stand whether an amendment he had discussed that morning with Cordova's counsel applied or not. On page 313 he again "didn't know" the answers to questions that had been previously discussed with him in his office by the counsel attempting to get him to repeat his answers on the witness stand.

V. THIS SECTION OF APPELLANT'S ARGUMENT COMMENCING ON PAGE 27 OF ITS BRIEF IS ENTITLED:

"The Conflicting Instructions on the Necessity for a Causal Connection Between Breaches of the Policy and the Crash Require a New Trial on the Issue of Overloading."

Appellant reconsiders the matter of conflicting instructions already covered in Part I of its argument,

with a review of some of the evidence on the loading of the airplane and concludes with a plea for a new trial.

On page 27 of its brief appellant states:

> "In the instructions quoted in specifications 1 and 2 (R358,362) the court informed the jury it *must find* such a causal connection in order to uphold Underwriter's affirmative defenses."

What appellant has done is to combine Specifications of Error 1 and 2 for argument even though they are based on different provisions of the policy and separate instructions.

Specification 1 concerns the overloading aspect and is based on General Condition No. 2 in the policy. Specification 2 concerns flying without a waiver and is based on General Exclusion 1(c) and the applicability of the words "any loss . . . arising from:" Appellant then cites cases such as *Bruce v. Lumbermen's Mutual and Casualty Co.,* 222 F. 2d 642 and *Globe Indemnity v. Hansen,* 231 F. 2d 895, in support of *both* specifications. Appellant then refers to both alleged errors merely as involving "breaches of the policy provisions." (Page 8 appellant's brief).

Such an approach to an analysis of the legal problems raised is superficial and specious, and leads one to wonder if the Underwriters are basically unaware that there is a difference between "General Exclusions" and "General Conditions."

The instructions on flying without a waiver are based on the only General Exclusion in the policy

raised as a defense, which is specifically modified by the words "any loss . . . arising from". (See General Exclusion 1(c) Tr-142). While the *Bruce* and *Globe* cases are also based on exclusions, the courts were not attempting to construe them as modified by the words "arising from". In addition, as pointed out in Part I of this argument, those cases involved public liability and specific exclusion provisions where, as in *Travelers Protective Ass'n. of America v. Prisen,* 291 U.S. 576, 78 L. Ed. 999 (which apparently established the doctrine) the policy specifically excluded liability for death of a person which occurred in the transportation of explosives. Therefore, the cases cited and their legal doctrine are not authority to construe the General Exclusion now before this court.

The Underwriters wrote their own General Exclusions. They saw fit to modify the first exclusion by the words "any loss . . . arising from." They must be bound by a layman's interpretation of their own wording.

And the cases mentioned are of even less assistance in construing the General Condition of the policy relied on in the defense of overloading.

Whether or not the plane was overloaded was properly a question for the jury. There was evidence both ways. The fact that there might have been 16 cartons of dynamite aboard was based on the testimony of Underwriters' witness Edwin E. Evans, a former site superintendent (Tr-253). On the other hand, Evans' testimony was very probably discounted by the jury because he was so positive on direct and so

obviously weak on cross examination. He denied telling Mr. Clark, a CAB investigator, that the best he "could see was approximately 8 cartons in the area of the accident." (Tr-267). On his testimony, enlarged photos of the scene of the crash were introduced (Tr-251 Defendant's Exhibit D) which were supposed to show about 16 cardboard cartons in the area of the crash. This might have indicated an overload. On cross examination he admitted that the best he could see was 8 or 9 box tops. It was brought out that each box or carton consisted of *two* identical parts. The witness Graham Mower testified that Mr. Clark of CAB had asked Mr. Evans how many cases of dynamite the pilot had aboard and that Mr. Evans said, "I don't know." (Tr-295-296).

The jury undoubtedly found that the Underwriters had failed to prove an overload on the airplane.

The Underwriters complain that the jury might have found that the plane was overloaded, but that the overload was not the cause of the accident, if they had remembered and been guided by the one conflicting portion of the court's instruction mentioned in detail under Part I of this argument.

The probability that the jury did this is quite unlikely. As pointed out in Part I the Trial Court instructed the jury no less than three times that if an overload was proven, they should find for the Underwriters and that the Underwriters need not prove that the overload caused or contributed to the crash to prevail on this defense. The instructions were read

or paraphrased to the jury in court and were not taken to the jury room.

On the other hand, Cordova's contention was and still is that the one sentence of apparent conflict in the mass of instructions that were otherwise all to the Underwriters' benefit, was the *only* sentence that stated the correct legal perspective as to General Condition No. 2.

The Underwriters wanted this condition treated exactly like an *exclusion* and this is just what the Trial Court did. If it had been intended to have the summary final effect of an exclusion, it would have been listed under General Exclusions and the governing phrase, "This Certificate . . . does not cover:" any operation outside the plane's Operations Limitations or CAA Approved Operations Manual, etc.

Instead, the provision was placed down in the "catch-all" portion of the fine print. Suppose the plane had crashed while in violation of some very minor requirement in the CAA Operations Manual, such as keeping the certificates posted in full view in the pilot's compartment? Would the Underwriters be permitted to avoid liability on the basis that this was a breach of a general condition of the policy. Not likely, unless it could somehow be shown that this breach *caused* the crash. The assumption would be that if they had wanted to exclude *any* flight in which *any* violation of the Operations Manual occurred, they would have said so by moving the provisions here involved two paragraphs up and under General Exclusions.

The logical interpretation of the intended effect of the General Conditions in this policy is that they are conditions to be observed by the insured. If not observed and a loss results *by reason thereof* the Underwriters are absolved of liability.

The court said in *Globe Indemnity Co. v. Hansen,* 231 F. 2d 895, 897:

> "The exclusion is based on *contract,* which excludes this risk without regard to causal connection." (Emphasis supplied)

and in *Bruce v. Lumbermen's Mutual,* 222 F. 2d 642:

> "An insurer need not show a causal connection between the breach of an *exclusion* clause and the accident, *if the terms of the policy are clear and unambiguous.*"

and in *Travelers Protective Ass'n of America v. Prinsen,* 291 U.S. 576, 78 L. Ed. 999:

> "Courts of high authority have held that in *policies so phrased* there is no need of any causal nexus between the injury or death and the forbidden forms of conduct."

Conversely, if the *contract* does not *clearly and unambiguously* treat the alleged breach as an exclusion, then it would be thoroughly unjust to construe it as such.

Underwriters would like a new trial. Payment of any claim has already been delayed over four years. An additional four years works a hardship only on Cordova Airlines, not the Underwriters.

It is submitted that the Underwriters received instructions favorable to them far beyond that war-

ranted by their contract and that a new trial is not justified.

VI. APPELLANT'S PART VI OF ITS ARGUMENT ON PAGES 31 AND 32 IS ENTITLED:

"It Was Error for the Court to Instruct the Jury to Construe 'Ambiguities in the Policy' Against the Underwriters."

Appellant contended there was no ambiguity in the disputed provisions of the policy. In response to a question by the Court if there was not ambiguity, counsel for Underwriters replied:

> "Mr. Talbot. None, whatever, and we rely on three of the most plain, simple, ordinary English sentences ever constructed by an insurance company, and . . ." (Tr-340).

Even after the Trial Judge had pointed out to counsel that the parties differed diametrically on the meaning of the phrase "Any loss, damage or liability arising from . . ." and the phrase, ". . . In which a waiver issued by the Civil Aeronautics Authority is required . . ." and that a dispute existed as to the difference between a General Exclusion and a General Condition, Underwriters' counsel steadfastly contended that, ". . . there's nothing there to construe. There's no ambiguity to resolve." (Tr-340-343).

And counsel for Cordova was of the same opinion as to his own interpretation of the phrases and the policy in general.

The court left the matter of construction to the jury with a batch of instructions based on highly

technical defenses affording the Underwriters every opportunity to win the case if only one juror had seriously adopted just one of the great variety of defenses advanced.

As to the instruction on ambiguity, even counsel for Underwriters agreed "It's perfectly good law, of course . . ." but still contended no ambiguity existed to which to apply it (Tr-340).

The very same policy came before this court in 1952 in *United States et al. v. Eagle Star Ins. Co. Limited, et al.,* No. 13,122, 196 F. 2d 317. Judges Healy, Bone and Pope applied the law of Washington State as to the ambigious nature of General Condition No. 3.

On rehearing of the same case in 1953, 201 F. 2d 764, Judges Healy and Bone concurred to reverse the judgment below. Judge Pope dissented on the ground that no ambiguity existed.

At the trial of this case Cordova likewise relied on General Condition No. 3 which now reads:

> "3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid *any loss or damage under both Sections 1 and 2 of this Certificate and/or Policy.*" (Emphasis added).

Apparently the Underwriters have changed the wording of the policy to insert the italicized words above, since the Ninth Circuit Court considered the same condition in the *Eagle Star* cases cited above.

The wording of General Condition (3) in the *Eagle Star* cases was:

"3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories." See 201 F. 2d 765 HN-1."

In Headnote 2 on page 766 the court decided the condition required that the insured use reasonable care to avoid or diminish loss or damage to the property in event of accident.

It is obvious that the court's construction of the meaning of General Condition No. 3 as it was written in the *Eagle Star* cases was not what the Underwriters had intended, because the wording has now been changed as italicized above so as to refer *directly to Section 1 of the policy* which is the *general insuring clause.*

As it now reads, the plain meaning of General Condition No. 3 is that Cordova should use reasonable care to avoid any loss or damage to the aircraft. See Section 1 and General Condition No. 3 of the policy here in dispute (Tr-142).

Conversely, if the insured had used reasonable care to avoid any loss or damage, then Underwriters would "pay for . . . loss of the aircraft . . . from whatever cause arising . . ." as guaranteed in Section 1. This is not an unreasonable construction and it is the

protection most business men *think* they are getting when they buy insurance. A small certificated airline such as Cordova, with its equipment mortgaged to keep modern, has a right to expect that in return for heavy insurance premiums, it will not be refused payment for a loss on technicalities and far-fetched construction of safety requirements where it had not failed to exercise reasonable care at all times.

Underwriters have not alleged that Cordova failed to use reasonable care to avoid this loss. As far as the accident is concerned, the cargo aboard might as well have been pig iron or cabbage.

The present wording of General Condition No. 3 and its specific reference to Section 1, as well as the *Eagle Star* holdings were drawn to the Trial Judge's attention and an instruction requested. Apparently the Trial Judge analyzed no further than the wording of headnote 2 on page 766 of 201 F. 2d and held that "due diligence" had nothing to do with the case (Tr-323).

In any event, as to a policy of one of these same defendants, very similar to the one in issue, Judge Healy said:

> "Had the insurance company deliberately set out to achieve obfuscation it could hardly have done a better job than was accomplished here." (201 F. 2d at 766, first column).

CONCLUSION.

In construing the policy here involved the definite separation of the "exceptions", "general exclusions" and "general conditions" by the Underwriters in the format must be observed. They were not all intended to be interpreted the same.

The strict rule of contract law requiring no causal connection between violation of an exclusion and the loss can not be applied to general conditions. To do so would work a gross deception on the insured.

The instructions to the jury on overloading were overwhelmingly to the advantage of the Underwriters because they repeatedly advised the jury that no causal connection between violation of a general condition and the loss need be shown by Underwriters. This was incorrect law. The only correct part of the instructions on overloading is the portion objected to by Underwriters.

The jury verdict in favor of Cordova should not be disturbed.

The intricate, complicated reasoning advanced by Underwriters to show that Cordova should have had a specific waiver for the flight in question is not supported by the regulations on analysis. There was no proof that the dynamite here involved was an "Explosive A", or that it was anything other than a gelatin dynamite and excepted; it was not included in Appendix A. In short, Underwriters' proof on this technical defense reaches a "dead end" short of any certainty, just as a search and study of *all* the regula-

tions that might be applicable produces nothing but organized confusion on the subject. But even if a waiver were required, CAB Order S-712 provided a blanket exemption. SR-417, which followed it in time, removes any shadow of a doubt. Its requirements are exactly the same. And the policy itself requires that the loss have been one "arising from" such flying in order to relieve Underwriters from liability.

The judgment of the Trial Court should be affirmed.

Dated, Anchorage, Alaska,
February 25, 1960.

Respectfully submitted,
STANLEY J. McCUTCHEON,
Attorney for Appellee.

(Appendix A Follows.)

Appendix A

Appendix A

Affects Part: 49 Regulation No. SR-417
Distribution: General

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Effective: May 28, 1956
Adopted: May 28, 1956

SPECIAL CIVIL AIR REGULATION

AUTHORITY TO DEVIATE FROM CERTAIN PROVISIONS OF PART 49 OF THE CIVIL AIR REGULATIONS WITHIN THE TERRITORY OF ALASKA

By letter dated March 26, 1956, Morrison-Knudsen Company, Inc., contractors and engineers, Boise, Idaho, requested the Board to permit certain operators, notwithstanding the provisions of Part 49 of the Civil Air Regulations, to transport Class A explosives and other dangerous articles in civil aircraft, within the territory of Alaska, which are necessary to complete certain urgent construction work being accomplished by this company in the interest of National Defense.

The Civil Aeronautics Administration has notified the Board that certain contractors other than Morrison-Knudsen are involved in the same construction work as the Morrison-Knudsen Company in connection with the "White Alice" military defense contract

and require similar authority to transport Class A explosives.

The Board has been advised by Morrison-Knudsen that these materials are essential in their construction work as a subcontractor to Western Electric Company, who, in turn, has a contract with the United States Air Force for important classified installation work throughout Alaska, and that all explosives or other dangerous articles will be shipped in accordance with Interstate Commerce Commission (ICC) packing and handling requirements. A listing of aircraft that are assigned under contract to the project concerned, together with the name of the contractor, base station, and area of operation was appended to Morrison-Knudsen's letter of March 26. The request for authority is to apply initially to the operators listed therein. Morrrison-Knudsen proposed to notify the Board when additional aircraft are put under contract to engage in the same work.

The Board has been further advised by Morrison-Knudsen that such shipment of explosives and other dangerous articles will be restricted to aircraft operating exclusively in Alaska and in connection with a military defense project identified as AF-33 (600-29717) and known as ALCOM or White Alice Project.

Under the provisions of §§ 49.41 and 49.81 of Part 49 of the Civil Air Regulations, no explosive or dangerous article listed in Part 72 of the ICC Regulations as a Class A explosive . . . shall be carried on aircraft. Section 49.71, however, authorizes the Administrator, in emergency situations or where other forms of

transportation are impracticable, to permit deviations from any of the provisions of this part for a particular flight where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of persons and cargo. Since the authority requested by Morrison-Knudsen in this matter is not for a particular flight but for a series of flights, the Administrator is not authorized to grant the special authority requested.

To support the Board's grounds for granting special authority to carry explosives in emergency situations or where other forms of transportation are impracticable, reference is made to §49.41 which permits transportation in cargo aircraft of any article packed, marked, and labeled in accordance with ICC Regulations for transportation by rail express. Under Section 71.13 of the ICC Regulations, shipment of explosives may be made upon request of the Departments of the Army, Navy, and Air Force of the United States Government after compliance with certain handling and packing regulations.

The Board notes that the ICC, pursuant to Section 71.13 of its regulations, has authorized the various United States military departments to transport Class A explosives, by rail, whenever critical situations dictated such authorization. In these situations, however, the ICC has required that certain stringent packing, stowing, and carriage provisions of its regulations be complied with as a condition of such authorization. In addition, it is noted that a number of air carriers were authorized to carry, in recent years during na-

tional emergency status, Class A explosives in civil aircraft where it was found necessary in the National Defense.

In a letter dated April 5, 1956, from cognizant authority in the Department of the Air Force, it is stated that the work under contract to Morrison-Knudsen "is behind schedule and the cargo involved is necessary for the completion of a major program which is in the interest of National Defense," and it is requested that deviation authority for the air carriers listed in Morrison-Knudsen's letter be granted for a period of not less than one year. The Board regards this justification as particularly compelling. Moreover, in view of the remoteness of the area to which these commodities are to be transported and the improbability of creating a hazard involving persons on the ground, the carriage of such commodities by air does not appear to affect the public interest adversely.

The provisions of this special regulation authorize deviations from Part 49 only with respect to the carriage of Class A explosives and the shipper and operator shall comply with the requirements of Part 49 in all other respects.

Prior to engaging in operations pursuant to this special regulation, each operator will be required to give notice to the Administrator of the type and registration number of the aircraft and the airports and other landing areas to be used.

Except for Class A explosives, the articles included in the list appended to Morrison-Knudsen's letter of

March 26 are not prohibited by Part 49 of the Civil Air Regulations for cargo-carrying aircraft. Therefore, the authorization contained herein is limited to Class A explosives.

Since this Special Civil Air Regulation authorizes the transporting of Class A explosives in a remote area and does not appear to affect the safety of the public adversely, and because the Board has been advised by the Department of the Air Force that the White Alice Project is behind schedule and the cargo involved is necessary in the interest of National Defense, the Board finds that omission of notice and public procedure is not contrary to public interest and that good cause exists for making this regulation effective on less than 30 days' notice.

In consideration of the foregoing, the Civil Aeronautics Board hereby makes and promulgates the following Special Civil Air Regulation effective May 28, 1956:

1. Contrary provisions of Part 49 of the Civil Air Regulations notwithstanding, and subject to conditions hereinafter set forth, the operators listed in Appendix "A" and any other operator authorized by the Administrator to be added to such list pursuant to this Regulation, may deviate from those provisions of Part 49 which prohibit the carriage of Class A explosives in aircraft, to the extent necessary to transport Class A explosives in civil aircraft to and from certain areas within Alaska as listed in Appendix "A", provided that:

a. Shipment of such explosives, by civil aircraft, shall be made only by operators authorized by Morrison-Knudsen Company, Inc., or other contractors acting under a military defense project known as ALCOM, DEWLINE, or White Alice and identified as contract AF-33 (600-29717);

b. Each operator shall furnish the Administrator, prior to carriage of such explosives, with a list showing the type aircraft, registration number, and area in which the aircraft is to be operated, and no deviation from this listing shall be made without the express approval of the Administrator;

c. Each shipper and operator shall comply with all pertinent provisions of Part 49 and the ICC Regulations including packing, marking, labeling, and loading requirements and with any special instructions issued by the ICC for the handling of Class A explosives;

d. The crew of the aircraft shall be thoroughly briefed on the characteristics and proper handling of the cargo;

e. Shipments may be made to and from a civil airport only if prior arangements have been made between the operator of the aircraft and local civil airport management;

f. The operations on and in the vicinity of civil airports shall be conducted in accordance with such special traffic rules as may be prescribed by the Administrator including weather minimums, airport approach and departure routes to avoid flight over

congested areas, and notification to the airport control tower of the nature of the cargo aboard;

g. The aircraft shall not be used to carry persons other than crew members and shall be operated in accordance with the aircraft performance and weight limitations applicable to passenger-carrying aircraft unless otherwise authorized by the Administrator; and

h. Single-engine aircraft shall be operated in accordance with operation specifications approved by the Administrator.

2. That, upon notification by Morrison-Knudsen Company, Inc., or other *bona fide* contractors acting pursuant to the above-specified contract that certain other operators of aircraft have been put under contract to engage in the same work, the Administrator of Civil Aeronautics is authorized to add to the list in Appendix "A" any such operator who to him meets the requirements of this Special Civil Air Regulation.

This Special Civil Air Regulation shall expire June 1, 1957, unless sooner superseded or rescinded by the Board.

(Sec. 205 (a), 52 Stat. 984; 49 U.S.C. 425 (a). Interpret or apply sec. 601, 52 Stat. 1007, as amended; 49 U.S.C. 551; sec. 902 (h) 52 Stat. 1015, as amended; 49 U.S.C. 622)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan

Secretary

(Seal)

Appendix "A" to Special Civil Air Regulation No. SR-417

Operator	*Area*
Morrison-Knudsen Company, Inc. Dist.	All of Alaska Except So. Eastern Section
Cordova Airlines	All of Alaska Except So. Eastern Section
Safeway Airways	Upper Yukon, Kuskokwim, Bristol Bay, Iliamna
Safeway Airways	Seward Peninsula
Circle Air Trails	Bristol Bay and Iliamna Area
Alaska Sportsmen	Kuskokwim Bay Area Which Includes Bethel & Platinum
Bernard Blanchard	Galena, McCrath and Fairbanks Area
Foster Air Service	Seward Peninsula